No. 256

RILEY CORPORATION

Petitioner

v.

CHRISTINE SMITH, ET AL,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

T. C. SAVAGE
A. C. MURPHY
J. M. P. SLOUGHTON
JOHN H. TEAGUE
HENRY L. BOYDEN
Attorneys for Respondents

TABLE OF CONTENTS

SUBJECT INDEX **PAGE**

Statement of the Case 1

Reasons Why Petition for Certiorari Should Be Denied 2

TABLE OF CASES CITED

Mutual Film Corporation v. Industrial Commission of Ohio, 236 U. S. 230 2

Kovacs v. Cooper, 336 U. S. 96 3

Shippman v. DuPre, No. 689, decided by this court March 31, 1950 3

City of Atlanta v. Universal Film Exchanges, Inc., 201 Georgia 463 3

Supreme Court of the United States

OCTOBER TERM, 1950

RD - DR CORPORATION
Petitioner

V.

CHRISTINE SMITH, ET AL,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

The summary of facts contained in the Statement made in the petition for certiorari (P 2) is reasonably accurate as far as it goes. It shows only that claim was made that the ordinance, partly set forth in the appendix to the petition and set forth fully in the record (R p. 11) was unconstitutional. The petition also attacked as unconstitutional Section 5-305 of the Code of the City of Atlanta (set out on p. 9 of the record), the same being the statutory charter authority pursuant to which the ordinance, which was also attacked as unconstitutional, was adopted (R pp. 3, 4, 5, and 7).

REASONS WHY WRIT OF CERTIORARI SHOULD NOT BE GRANTED.

1.

The first and fundamental question presented by petitioner, as set out on page 2, is "Whether the protection accorded by the United States Constitution to the press and speech is also applicable to motion pictures."

This question has already been unequivocably decided in the negative by this court in the case of Mutual Film Corporation v. Industrial Commission of Ohio, *236 U. S. 230*, and the decision of the Circuit Court of Appeals for the Fifth Circuit, which it is now sought to review, decides the question exactly in accordance with the decision of this court in the Mutual Film case.

2.

The petition does not bring itself within a single one of the reasons set forth in sub-paragraphs (a), (b) and (c) of Rule 38 of this court as the reasons for granting ~~this~~ the writ of certiorari.

3.

It is not shown that the decision of the Circuit Court of Appeals for the Fifth Circuit is in any wise contrary to any decision of any court in the United States. As a matter of fact, so far as we have been able to determine, the decision which it is sought to have reviewed is not only in accordance with the decision of this court in the Mutual Film case, herein referred to, but is in accord with every decision rendered on this subject by all State and Federal courts of the country. The said Mutual Film Corporation case was cited with approval as late as 1949 in a decision of this court. See con-

curring opinion of Mr. Justice Frankfurter in the case of Kovacs v. Cooper, *336 U. S.* beginning on p. 96.

It is shown by the record that the ordinance which it is claimed is unconstitutional (R p. 11) was adopted by the City Council of Atlanta pursuant to Section 5-305 of its charter (said section in record, p. 9), which charter authority it is also claimed in this suit to be unconstitutional (R pp. 3, 4, 5, and 7). Therefore, this charter authority and the ordinance adopted pursuant thereto constitute State action, and should not be interfered with by Federal courts until these state laws have been construed by the State courts. Shippan v. DuPree, *No. 689*, decided by this court March 31, 1950. Petitioner seeks to avoid this matter by claiming that there is no clear remedy in the form of injunctive relief in the Georgia Courts, (p. 10 of petition), citing City of Atlanta v. Universal Film Exchanges, Inc., *201 Georgia 463*, which was a case in which the same charter provision and the same ordinance were attacked as unconstitutional on the same grounds as in this case, and injunction prayed. Injunction was granted by the trial court but the case was reversed by the Supreme Court of Georgia because the petition did not set forth a cause of action. However, a reading of this case, particularly what is said on p. 472, will disclose that the Georgia Supreme Court in effect stated that if petitioners in that case had alleged, as did the complainants in this case, that they had contracted, or attempted to contract, with any other person for the exhibition of the picture in Atlanta, or that any other person desired to so exhibit it, that the petition would have stated a cause of action authorizing an adjudication by the State courts of the questions raised. We therefore say that the claim-

ants in this case had an available and adequate remedy in the State courts and should have pursued the same there before appealing to the Federal courts.

5.

This case was originally filed by two complainants, Film Classics, Inc. and RD-DR Corporation (Complaint, R p. 2). Film Classics, Inc. had the exclusive right to distribute and license the exhibition of the picture involved (R p. 5) and it, and it alone, applied for and was refused a permit to show the picture in the City of Atlanta. It was the only complainant which had been denied any alleged right by the defendants (R pp. 5 and 6). Film Classics, Inc. was the only one (if any one was) entitled to bring this action. No specific question was raised in the court below against RD-DR Corporation being a party because if Film Classics, Inc. was entitled to maintain the suit, the addition of the other plaintiff was mere surplusage and made no difference. Now, however, Film Classics, Inc. is out of the picture (see note at bottom p. 4 of petition for certiorari) and the petition for certiorari is made only by RD-DR Corporation. It is therefore respectfully urged that notwithstanding Rule 48 of this court RD-DR Corporation never having applied for nor been denied the right to show the picture involved so as to entitle it to attack the constitutionality of the laws in question, has no right to maintain alone a petition for certiorari in the case.

6.

There is no evidence in this case. It was disposed of only on the complaint and defendants' motion to dismiss (petition for certiorari, p. 3). While many facts are assumed and stated in the petition for cer-

tiorari which are not set out in the complaint, found in record, p. 2, this case should be considered only on the facts judicially before the court in the complaint, and it is respectfully submitted that the facts set forth in the complaint are not sufficient to authorize a finding that motion pictures come within the freedom of the press clause of the Constitution, even if the court were inclined to so hold, if sufficient evidence as to motion pictures had been presented.

7.

Motion picture companies are primarily and fundamentally engaged in the business of entertainment for profit, and the holdings heretofore made by all courts of the country, including the Supreme Court of the United States, that motion pictures do not constitute a part of the press of the country, should not be disturbed. The particular picture involved in this case "was produced and is being distributed primarily for entertainment to theatre audiences." (Complaint, R p. 7). That the motion picture industry is engaged primarily and principally in entertainment, and is legally so classified, is shown the fact that the United States Government by Act of Congress assesses an *entertainment tax* on admission tickets to such performances.

In view of the foregoing, respondents respectfully pray that the petition for certiorari in this case be denied.

Respectfully submitted,

J. C. SAVAGE
J. C. MURPHY
J. M. B. BLOODWORTH
JOHN E. FEAGIN
HENRY L. BOWDEN

Attorneys for Respondents
803 C & S Natl. Bank Bldg.
Atlanta 3, Georgia